IN THE

Supreme Court of the United States.

TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
W. W. SWEARINGEN,
Defendant in Error.
No.

BRIEF FOR PLAINTIFF IN ERROR.

W. W. Swearingen, defendant in error, instituted this suit on the 24th day of February, 1902, as plaintiff in the District Court of El Paso County, Texas, 34th Judicial District (see Record pp. 2) and thereafter this cause was removed in due time and according to law by plaintiff in error here, defendant there, to the United States Circuit Court, Western District of Texas, sitting at El Paso, Texas (Record pp. 5.6.7.8.9.) and the same was duly filed in the said Court on the 25th day of August, 1902 (Record p. 9) and on the 11th day of November, 1902, de-

fendant filed his amended original petition, in which he alleges substantially as follows: That the defendant owned and operated, on and prior to the 7th day of February, 1902, a line of railway, running into and through El Paso County, and across the State of Texas, and into the City of El Paso, where it has tracks and switches constituting a general switch yard for the handling, switching and shifting, of both passenger and freight cars; that on and prior to the 7th day of February, 1902, he was in the employ of plaintiff in error as a switchman, working in its switch yard in the City of El Paso, and his duties were to couple and uncouple cars, shift switches, and assist in the placing, switching and shifting of cars on the various tracks in the switch yard, which cars were moved by means of a locomotive; that he was under the direction and supervision of another servant of plaintiff in error called a yardmaster.

That on the 7th day of February, 1902, while engaged in the performance or his duties he was riding on the ladder on the side of a certain freight car of a train of cars attached to said locomotive, which ladder is placed there for employes to ride on while working, and which train of cars were going in a westerly direction along track No. 2 of the switch yards; that his body was swinging slightly out from the car in the proper and usual position to ride on said ladder.

That the yardmaster was at the east end of the train of cars, directing their movements by means of a lantern, it being in the night time, and he was looking back towards said yardmaster for such signals as he might want to give, as was his duty, when he came in contact with the scale box structure, which had been

negligently placed by plaintiff in error, or permitted to remain so near the north rail of said track as not to permit of the passage of his body in the position he was riding, and he was thrown to the ground and dragged along by the cars and permanently injured.

That the scale structure was of a permanent character, and had been at the same place for many months prior to the time he received his injury, and had been placed there, and during said time maintained and used by plaintiff in error, or was permitted to remain there by plaintiff in error; plaintiff in error knowing, or could have known by the use of ordinary care the location of it, and it was during all said time so close to the north rail of said track as to endanger the life and limb of plaintiff in error and other employes while engaged in their duties, and constituted a dangerous obstruction to said track, all of which was well known to plaintiff in error, or could have been known by the use of ordinary care, but which was unknown to plaintiff; that in placing said scale structure or permitting it to remain at the place above recited, plaintiff in error was guilty of negligence, and defendant in error received his injuries by reason of said negligence; that defendant in error claims damages in the sum of $25,000.00. (Record, pp 9.10.11.12.)

Plaintiff in error, defendant below, answered in its first amended original answer filed November 12th, 1902, first, general demurrer; second, general denial; third, special plea, that defendant in error injuries were not caused by negligence of plaintiff in error, and denying that said scale structure was erected so near said track on which defendant in error was working as to injure him, but that the same was erected in a proper and

safe manner and at a safe and proper distance from said track, and that defendant in error was injured through his own negligence in the careless manner in which he rode on said cars; fourth, that if said scale box structure was erected so near said track as to be dangerous to defendant in error, he knew it, or could have known of it by the use of ordinary care, and assumed the risk arising therefrom in this, that he had been in the employ of plaintiff in error both as a switchman and brakeman for a long time prior to the accident, and worked in the yards and especially on said track No. 2 on which he was injured; that track No. 2 is a switch track frequently used by employes of plaintiff in error and by defendant in error; that the scale box structure is about six feet high and five feet wide, and it and its location to the track is open, patent, and obvious to the sight, and all of which was well known to defendant in error, or could have been known to him by the use of ordinary care, and by the use of ordinary care he could have avoided the collision with it, and that he was injured through his own negligence; fifth, that defendant in error well knew the situation and location of the track scale box in relation to track No. 2, and assumed the risk arising therefrom, and was injured by his own negligence in riding upon the car in the manner which he rode, and in not using proper care to avoid the collision, he knowing the danger and that he was approaching the same. (Record, pp. ~~14-15~~.) 12.13.14

The cause was tried at the November Term A. D. 1902, of the United States Circuit Court, Western District of Texas, at El Paso, and resulted in a judgment on November 14, 1902, in favor of defendant in error against plaintiff in error for $7,500. (Record p. 15).

Plaintiff in error duly filed on December 17, 1902, its bill of exceptions, (Record pp. 19), assignments of error (Record pp. 37), petition (Record, p. 39), bond for writ of error (Record pp. 41), and carried the cause by writ of error to the Honorable United States Circuit Court of Appeal, for the Fifth Circuit at New Orleans, La., which Court affirmed the verdict of court below, see 122 Fed. Rep. p. 193, from which decision plaintiff in error has perfected its writ of error to this Honorable Court.

At the time defendant in error was injured he was a member of a switching crew working in the yards of plaintiff in error, composed of L. C. Brown, engineer, W. T. Butts, fireman, operating switch engine, and R. P. Moore, yardmaster, and Frank I. Williams, and defendant in error, switchmen.

Tracks Nos. one and two hereinafter referred to in the testimony are switch tracks and run parallel to each other, in an easterly and westerly direction, and track No. one is called the weigh track and runs across the bed part of the scales, and is north of the scale box structure, and track No. two is just south of the scale box structure, and is the track on which defendant in error was riding on a car at the time he collided with the scale box structure.

The scales consist of two parts. One the bed or weighing part, on which track No. one is, and the other part is that which hold the balances to the scales, and is an upright structure more than six feet high and about five feet long, by the side of the track, and about 18 inches thick, and is painted a light green color, and is called the scale box.

The switch engine always heads west, and the engineer's side is the north or right hand side, and the

switchmen always work on the north or right hand side for convenience in signaling the engineer how to move the engine and cars. (Trans. ~~22, 23~~. 19. 20

The errors assigned in this court are the same as those assigned in the Circuit Court of Appeals, with the exception of the general assignment of error that the Circuit Court of Appeals in affirming the judgment of the United States Circuit Court for the Western District of Texas. The first assignment of error which was relied upon in the Circuit Court of Appeals at New Orleans, and which we assign in this court, is as follows:

> "2nd. The trial court erred in refusing to permit defendant to introduce in evidence portions of the written application for employment as a brakeman on defendant's railroad, made by plaintiff to defendant on February 22nd, 1902, as shown by defendant's bill of exception; because said testimony was material to defendant, in this: that the questions asked plaintiff in said application, and the answers made thereto by plaintiff, show that plaintiff had notice of the location of the track scale box, and that he was in danger of being knocked off a car in passing same."

And in connection with this assignment of error, we present also the assignment of error that the Circuit Court of Appeals at New Orleans erred in holding that this assignment of error was not well taken. We respectfully submit to the Court that the question involved in this assignment of error is one of great importance to railway companies, at least in the section of country through which the Texas and Pacific Railway is operated, for the reason that with a full knowledge of the great dangers incident to train service, men who have had practical experience in such service have

attempted, in the form of application blanks such as was attempted to be introduced on this trial, to call the attention of employes in train service to the many risks and dangers incident to said service, and the effect of the opinion of the learned Judge of the Circuit Court of Appeals in holding that the form of application blank in use by the Texas and Pacific Railway Company in this instance is void as against public policy, and could not be used even as evidence of the fact that the employer had attempted to call the attention of the employe to the risk and dangers of the service, is to say to the men in charge of the operation of railways in the Southwest that they are forbidden to advise their employes of such dangers, and in effect holds that any employe, however well advised of such dangers, does not assume any such risk. It is an elementary proposition entering into all contracts between master and servant that the servant assumes all the risks ordinarily incident to the business. To use the language of the authorities:

> "When a servant enters into the employment of another, he assumes all the risks ordinarily incident to the business. He is presumed to have contracted in reference to all the hazards and risks ordinarily incident to the employment; consequently he cannot recover for any injuries resulting to him therefrom."

2. A servant takes the risk of the master's mode of conducting his business, though a safer one might be followed, if the servant fully knows the risk and continues to work. There are risks and dangers incident to most employments, those risks the parties have in view when engagements for services are made, and in consideration of which the rate of compensation is

fixed. In all engagements of this character, the servant assumes those risks that are incident to the service, and as between himself and the master, he is supposed to have contracted on those terms, and if injury is sustained by the servant in that service, it is regarded as an accident, and the misfortune must rest on him."

Authorities:

Wood's Master & Steward, 2nd Edition, Section 326.
Wood's Railway Law, 3rd Volume, Section 370, page 1452.
A. & E. Encyclopedia, Volume 14, bottom page 843, Section 23, under head of Master and Servant; also bottom page 845, under subhead Master's Business Methods.
Texas & Pacific Railway Co. v. Minnick, 57 Fed. Rep., pp. 362–8.
Tuttle v. Railway, 122 U. S. 189.
Randall vs. Railway, 109 U. S. 478.
H. & T. C. Ry. Co. v. Conrad, 62 Texas 627.
Woodward v. St. Paul M. & M. Ry. Co., 18 Fed. Rep. 282.
Missouri Pacific Ry. Co. v. Summers, 71 Tex. 700.
Green v. Cross & Eddy, Receivers, 79 Tex. 130.
Naylor v. Railway Co., 5th A. & E. R. R. Cases, 406.
Wonder v. Baltimore Ry. Co. 32 Maryland, 411.
Crilly v. Texas & Pacific Ry., Co., decided by Louisiana Supreme Court, January 4, 1892, reported in Vol. 53 A. & E. R. R. Cases, p. 104.
Kohn v. McNulty, Receiver, 147 U. S. 238.

In considering the rules laid down above, it should also be considered in connection with the following doctrine, which is the established law of the land, to-wit: that it is the duty of the master to advise the serv-

ant, or to inform him, of the dangers incident to the employment, if the servant is ignorant of them. If the dangers are obvious and patent, and the servant advises himself, of course the duty of being advised by the master would not be imposed. One of the specific issues in this case was whether or not the plaintiff below was advised of the location of the scale box, and the fact that it was a danger incident to his employment. The Court below, in its charge to the jury, recognized this issue, and submitted to the jury the question as to whether or not the plaintiff was advised of the location of the scale box and the danger incident thereto. We call the court's attention to so much of the bill of exceptions covering the attempted introduction of the application for employment blank. It reads as follows:

> "The defendant then produced and showed to the plaintiff his written application to defendant company for employment as a brakeman signed by plaintiff and dated February 22, 1900, and plaintiff testified that he had read the same at the time he made it, and had written the answers thereto himself to the questions therein asked him, and had signed it. Defendant then offered in evidence the following portions of said application, consisting of questions and the answers thereto written by plaintiff for the purpose of showing that plaintiff had notice of the location of said track scale box, and that he was in danger of being knocked off of a car when passing the same:
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> Question: 'Do you make this application for employment in train service, realizing the hazardous nature of such employment, understanding that it is necessary in operating this railway for the company to have overhead and truss bridges at certain points on the line; also coal chutes, track scale boxes, water tanks, coal houses, platforms, sheds, roofs and other overhead and side structures, and that in performance of the duties for which you

are employed you are liable to receive injuries by being knocked off the side or top of cars, unless you use due care to avoid injury thereby.'

Answer: 'Yes.'

Question: 'Do you agree to acquaint yourself with the location of all overhead and truss bridges, as well as the location of all other structures along the line of the road?'

Answer: 'Yes.'

Question. 'Do you understand that no officer or employe of this company is authorized to request or require you to use defective tracks, cars, machinery or appliances of any kind, and that when you do so you assume all risk of injury therefrom?'

Answer. 'Yes.'

Question. 'Do you understand that this company desires to employ only experienced men in the service, and does not undertake to educate inexperienced men?'

Answer. 'Yes.'

Counsel for plaintiff objected to the said testimony for the reason that it was irrelevant and immaterial, and that plaintiff had made this application and entered the employ of defendant, and afterwards resigned, and again entered the employ of the defendant some two years later, without making another application, and also because it was an effort on the part of defendant to limit its liability for its own negligence, and void as against public policy, and because the particular location of this track scale box is not given; and the Court having sustained plaintiff's objections and excluded said testimony, the defendant then and there excepted to the action of the Court in excluding said evidence, and tenders this, its bill of exception, which is allowed, signed and sealed by the Court."

Record 31. 32

This Court's attention is called to the fact that the purpose of introducing so much of said blank was that of showing that the plaintiff had notice of

the dangerous location of said track scale box, and that he was in danger of being knocked off a car when passing the same. Said application to defendant company for employment was not introduced in bar to any recovery if negligence were shown, but was introduced as proper evidence to go to a jury to enable them to say whether or not the plaintiff Swearingen had been advised of certain risks and dangers, and if so, whether he had acted on such advice. The real and substantial issue in this case was whether of not Plaintiff Swearingen had knowledge of the location of the scale box, and whether or not, having such knowledge, he knew there was danger, and such a danger as he had assumed when he entered the service. - Swearening, in his own testimony, expressly states as follows:

> "I knew the location of the scale before I was hurt. I knew it was between tracks Nos. 1 and 2, but I did not know anything with reference to its proximity to track No. 2, and did not know it was dangerously close to track No. 2. At the time I was hurt I had no knowledge of the distance between the scale box and No. 2 track. I was never warned about the danger of getting knocked off of cars by this scale box, and at the time I was hurt I was attending to my work, and thinking about my duties, and looking for a signal from the yardmaster, and was not thinking about the box. I did not see it immediately prior to the time I struck it. The scale box was at the same place when I struck it, as it was when I first went to work for defendant." Record p 22

Here the plaintiff himself testifies that he knew of the location of the scale box before he was hurt. Then the very purpose of the statement in the application for employment was to call his attention to the fact

that "it is necessary in operating this railway for the company to have overhead and truss bridges at certain points on the line; also coal chutes, **track scale boxes**, water tanks, coal houses, platforms, sheds, roofs and other overhead and side structures, and that in performance of the duties for which you are employed you are liable to receive injuries by being knocked off the side or top of cars unless you use due care to avoid injury thereby." The very purpose of this statement was to inform Swearingen of the fact that the **scale boxes** were elements of risks incident to his employment, and were dangerous, and when he saw a **scale box** or a platform, or a coal chute, and was working adjacent to or around them, that they themselves were **warnings** of danger and he must exercise proper precaution in order to prevent an injury to himself. In other words, take the case at bar, Swearingen's attention had been specifically called to the fact that the company had scale boxes constructed so near as to be dangerous unless he exercised proper precaution to protect himself. With this knowledge, just as soon as Swearingen saw the scale box in question, and knew its location, it was incumbent upon him to exercise all precaution to prevent injury, and, in view of the issues in this case, the court below committed a grave error in not permitting the defendant company to show that, in the exercise of good faith and in the performance of a legal duty imposed upon it, it had advised Swearingen of the very risk and danger which caused his injury. We, therefore, submit that the learned Judge who rendered the opinion of the Circuit Court of Appeals at New Orleans, in holding that such a notice was contrary to public policy, has defeated the very end that was

sought to be accomplished as a matter of public policy in passing laws prohibiting contracts against negligence. This application for employment does not seek to relieve the company of any liability for negligence. It does not seek to bind the employe by contract reliving the company of any of its lawful duties to him, but it seeks to comply with the legal obligation of the employer to notify the employe of the risks of the employment. It is in the line of humanity, and is based upon public policy, and good faith between the employer and employe, and to hold that such a contract is void is practically to hold that the employer should not in the exercise of good faith and humanity advise his servant of the great risk and dangers incident to train service. We call the Court's attention to the fact that in addition to calling the servant's attention to the fact that in the operation of its road it was necessary to have scale boxes constructed in dangerous proximity to its tracks, it also called his attention to the fact that there were other dangers, such as coal chutes, depot platforms and overhead structures. It would have been impossible to have set out in minute detail the exact location of the scale boxes, coal chutes, depot platforms, and the exact distance between the side of a car and the coal chute, depot platform and scale box; nor would this be required, either by law or a good business judgment; but when the master tells a servant that these things are dangers, and that in the operation of his business it is necessary to have such things, then when the servant ascertains the location of these risks he is at once put upon his guard, and must exercise proper care to prevent an injury. In other words, when the

servant locates the scale box, or locates the platform, or locates the coal chute, and is working in connection therewith, he assumes the risk of doing so with full knowledge of the fact that he has been advised in advance that there is an increased danger and that he must be on the lookout for this increased danger. It is evident in reviewing the opinion of the learned Judge of the Circuit Court of Appeals for the Fifth Circuit that he did not consider the purpose for which the application for employment was introduced, that is, to show that the master had performed his duty in advising the servant of a risk, not for the purpose of showing that the servant had contracted away any right, not introduced for the purpose of being a bar to any recovery, but introduced for the sole purpose of showing that the master had performed his duty, and to be submitted to the jury as evidence that the servant knew of the danger incident to working with a scale box of whose location he testified he was advised, and having the jury say whether or not, under these circumstances, he was entitled to recover. If this Court should follow the decision of the Judge who tried the case, and the decision of the Circuit Court of Appeals, it would practically annul and revoke the rule established not only by this Court, but by every court in the land, that it is the duty of the master to advise the servant of the dangers incident to his employment, and would prohibit the master from showing as a defense to a recovery that he had in good faith so advised the servant of such risk and such danger. The United States Circuit Court of Appeals at New Orleans, in its opinion, cited the case of Gulf, Colorado & Santa Fe Ry. Co. v. Darby, 67 S. W., 446, in the

matter of contracts limiting the liability of the master company against public policy, but that opinion itself recognizes the duty of the master to call the attention of the servant to the risks and dangers incident to the employment. If the defendant company had introduced the notice for the purpose of showing that the plaintiff below was estopped from any recovery on account of the recitation in this blank, regardless of the fact whether or not the master had been negligent, the case of Railway versus Darby might be in point, and the opinion of the learned Judge of the Circuit Court of Appeals at New Orleans might have some bearing upon this case. But it was not introduced for any such purpose, but introduced for the sole purpose, and limited to that purpose, of showing that the master had advised the servant of certain risks incident to the employment, and when the servant located those risks and dangers, and was working in connection therewith, it was proper to submit the question to a jury as to whether or not he had not assumed such risks, or was not guilty of contributory negligence in the manner in which he conducted himself, in view of the fact that he had knowledge of such risks. We call the Court's attention to the charge of the court below upon the question of knowledge upon the part of the plaintiff below as to the existence of the scale box. The Court's charge is as follows:

> "Upon this point you are instructed that if you believe from the testimony that, prior to the plaintiff's injuries, he knew of the existence and location of the scale box and the danger incident to the discharge of his duties while passing the same on moving train, if danger there was; or if, knowing of the location of the structure, the

danger to the employes while in the usual discharge of their duties was apparent, that is open to observation, then you are instructed that the plaintiff, by continuing in the employment of the defendant without complaint, assumed such risks, and he would not, therefore, be entitled to recover. In this connection you are further instructed that the mere fact that the plaintiff knew of the **existence** and **location** of the **scale** box would not, as a matter of law, charge him with a knowledge of the danger, if such there was, due to **its proximity** to the north rail of track No. 2; and whether he knew of the danger is a question of fact for you to determine from a consideration of all the facts and circumstances in evidence."

Record p 34

This Court's attention is called especially to so much of said charge as reads as follows:

> "In this connection, you are further instructed that the mere fact that the plaintiff **knew** of the existence and **location** of the scale box would not, as a matter of law, charge him with a knowledge of the danger, if such there was, **due** to its **proximity** to the north rail of track No. 2; and whether he knew of the danger is a question of **fact** for you to determine from a consideration of all the facts and circumstances in evidence."

Record p 34

In view of this charge to the jury, we respectfully submit that the defendant below had the right to introduce the written application, signed by Swearingen himself, in which his attention was called to the fact that scale boxes were located in such close proximity to the tracks of defendant company that they were dangers, for the reason that, taken in connection with the testimony of Swearingen himself that he knew of the location of the scale box in question, then he at once became advised of the fact that it was a danger, it was, at least, proper evidence to submit to the jury as to

whether or not, in view of the signed statement to the effect that his attention was called to the fact that scale boxes were constructed in dangerous proximity to the tracks, he should then have been on the lookout for such scale boxes and guarded himself.

Here the Court submits the issue to the jury, and charges them in effect that although he knew of the location of the scale box, yet it was a question of fact for the jury to say whether or not, knowing such location, he knew that there was a danger, and at the same time the Court prevents the defendant company from introducing written evidence to show that it had called Swearingen's attention to the fact that he must be on the lookout for the dangers incident to working in connection with scale boxes. It is needless to present to the Court the question that this error was harmful to the defendant company. It was the leading issue in the case, and one that the jury must have found against the company, or else it could not have found a verdict. The Court will see, by an examination of the opinion of the Circuit Court of Appeals of the Fifth Circuit in this case, that the learned Judge who wrote the opinion intended by the opinion to modify the terms and limit the application of the rules theretofore announced by courts of the highest authority with reference to the doctrine of assumed risk. The opinion is published in 122 Fed. Rep., page 195, and the announcement of the Court that it did so intend to modify such rules is found on page 205 of the opinion. We beg to submit that in view of the very reasons given by the learned Judge in that opinion, that the tendency of the Federal Courts had been for a liberal interpretation of the law of negligence in favor of the public, and especially

of servants, and that legislation had been enacted by Congress to promote the safety of employes and travelers upon railroads, and that in Texas so much of the fellow-servant doctrine as applied to railway employes had been annuled, and any contract between employes and employers as seeking to impose upon employes an assumption of risk from the negligence of their fellow-servants declared void," that the greater reason exists why the employer should be authorized and entitled to show that he had called the employe's attention to risks and dangers that the employe and the master had the legal right to contract in regard to. It is further apparent from that decision that the Circuit Court at New Orleans was of the opinion that the contract for employment was introduced for the purpose of being in bar to any recovery, and not alone for the purpose of showing that the master had exercised good faith in advising the servant of a risk. The whole opinion indicates this, and the Court practically passed upon this question alone in the opinion. The Court cites the general rule of law that a servant is held to assume the ordinary risks of the business which he enters, so far as those risks at the time of entering upon the business are known to him, or should be readily ascertainable by persons of his age and capacity, in the exercise of ordinary care. Fed. Rep. 122, p. 204. Yet while recognizing this rule, it practically holds that the master is estopped from showing that he has advised the servant of a risk incident to the employment, and a risk that the master has to maintain in the conduct of his business, and a risk such as a servant should be advised of in order that he may protect himself against it. We respectfully submit that no

Court has held, and no legislation has been enacted, to the effect that the master is relieved of the duty of advising a servant of a risk incident to the employment, and one unknown to the employe; that the rule of law upon this subject is unchanged and needs no modification, as it is a rule of law based upon humanity and good faith; and said rule of law existing, it follows as a sequence that if the master owes this duty to the employe, when sued for a breach of same he should be entitled in any court to show that he in good faith had advised the servant of a danger incident to the employment and of the specific risk. That is what the defendant company undertook to do in the trial of this case, to show that it had so advised Swearingen of the risk incident to working in connection with scale boxes. The court below refused to permit the defendant company to introduce such evidence, and on appeal to the Circuit Court of Appeals at New Orleans that court practically held that such a contract or such evidence is contrary to public policy and could not be introduced. We submit that this was error, and grave error; that the decisions on this question need no modification or limitation; that they are sound in principle and based upon good faith and humanity, and that the rule of law governing this feature of the case has not been changed, either by State legislation or by national act; that the opinion of the Circuit Court of Appeals in holding as it did contravenes the rule of law laid down by this Court, and is erroneous.

The plaintiff in error submits the third, fourth, fifth and sixth assignments of error together; they are as follows:

> "2nd. The trial court erred in refusing to permit defendant to introduce in evidence portions of the

written application for employment as a brakeman on defendant's railroad, made by plaintiff to defendant on February 22nd, 1902, as shown by defendant's bill of exception; because said testimony was material to defendant, in this: that the questions asked plaintiff in said application, and the answers made thereto by plaintiff, show that plaintiff had notice of the location of the track scale box, and that he was in danger of being knocked off a car in passing same.

3rd. The trial court erred in overruling defendant's motion to instruct the jury to return a verdict for defendant, because the undisputed evidence established that said track scale box was erected in the defendant's yard and under the circumstances in a reasonably safe place and at a reasonably safe distance and location from track No. 2, on which track plaintiff was riding at the time he was injured.

4th. The trial court erred in overruling defendant's motion to instruct the jury to return a verdict for defendant because plaintiff testified he knew of the location of the track scale box, and the location of track No. 2 with reference to said track scale box, on which track No. 2 he was riding at the time he was hurt, and because the undisputed evidence shows that the track scale box and the danger of same was open and obvious to the view of plaintiff, and that neither the track scale box or the dangers thereof were hidden or latent, and plaintiff was presumed to know the danger and assume the risks thereof.

5th. The trial court erred in overruling defendant's motion to instruct the jury to return a verdict for defendant for the reason that the entire and uncontroverted testimony established the fact that plaintiff knew of the location of the track scale box, and location of said track No. 2, with reference to said track scale box, on which track he was riding at the time he was hurt, and that the track scale box, and the dangers of the same was open and obvious to the view of plaintiff, and

not hidden or latent, and plaintiff was presumed to know the dangers and assumed the risks.

6th. Because the trial court erred in the following portion of its charge to the jury:

'The defendant claims that the plaintiff knew of the existence and location of the scale box with which he came in contact, and that by continuing in the work, with such knowledge, he assumed all risks incident to and arising out of his employment. Upon this point you are instructed that if you believe from the testimony that prior to the plaintiff's injuries he knew of the existence and location of the scale box, and of the danger incident to the discharge of his duties while passing the same on a moving train, if danger there was; or if, knowing of the location of the structure, the danger to the employes while in the usual discharge of their duties was apparent, that is, open to observation, then you are instructed that the plaintiff, by continuing in the employment of the defendant without complaint, assumed such risks, and he would not, therefore, be entitled to recover. In this connection you are further instructed that the mere fact that the plaintiff knew of the existence and location of the scale box, would not, as a matter of law, charge him with knowledge of the danger, if such there was, due to its proximity to the north rail of track No. 2, and whether he knew of the danger is a question of fact for you to determine from a consideration of all the facts and circumstances in evidence.'

Because the proof showed that plaintiff knew of the location of the track scale box, and of track No. 2, on which he was riding at the time he was hurt, in reference to said scale box, and that the same and the location thereof was open and obvious to plaintiff's view, and being an experienced brakeman, he was charged with notice that riding on the cars as he did was dangerous, and he assumed the risks thereof, and the Court should have so charged the jury."

The practical effect of all of above assignments of error is that the Court committed an error in not instructing the jury to find for the defendant in error, and we will discuss said assignments of error from this standpoint alone. We submit the following propositions of law in support of said assignments of error, and will discuss same in view of the decisions here cited.

In every case before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

I.

Authorities:

Improvement Co. v. Munson, 14 Wallace, bottom page 448;
Commissioners, Etc. v. Clark, 94 U. S. 278, bottom page 284;
Pleasants v. Fant, 22 Wallace, bottom page 120;
Randall v. B. & O. Ry. Co., 109 U. S. 482;
Railway Co. v. Converse, 139 U. S. 469–472;
Schofield v. C. M. & St. P. Ry. Co., 114 U. S. 615–619;
Steamship Co. v. Merchant, 133 U. S. 375.

II.

(*a*) When a servant enters into the employment of another he assumes all the risks ordinarily incident to the business. He is presumed to have contracted in reference to all the hazards and risks ordinarily incident to the employment; consequently he cannot recover for injuries resulting to him therefrom.

(*b*) The servant takes the risks of the master's mode of conducting his business, though a safer one might be followed, if the servant fully knows the risk and continues to work.

(*c*) There are risks and dangers incident to most employments, those risks the parties have in view when engagements for services are made, and in consideration of which the rate of compensation is fixed. In all engagements of this character the servant assumes those risks that are incident to the service, and as between himself and the master he is supposed to have contracted on those terms, and if an injury is sustained by the servant in that service, it is regarded as an accident, and the misfortune must rest on him.

Authorities:

Woods' Master & Steward, 2nd Edition, Section 326;
Woods' Railway Law, 3rd Volume, Section 370, page 1452;
A. & E. Encyclopedia of Law, Volume 14, bottom page 843, Section 23, under head of Master and Servant; also bottom page 845, under sub-head Master's Business Methods;
Texas & Pacific Railway Co. v. Minnick, 57 Fed. Rep., pp. 362–8;
Tuttle v. Railway, 122 U. S. 189;
Randall v. Railway, 109 U. S. 478;
H. & T. C. Ry. Co. v. Conrad, 62 Texas 627;
Woodworth v. St. Paul M. & M. Ry. Co., 18 Fed. Rep. 282;
Missouri Pacific Ry. Co. v. Summers, 71 Tex. 700;
Green v. Cross & Eddy, Receivers, 79 Tex. 130;
Naylor v. Railway Co., 5th A. & E. R. R. Cases 406;
Wonder v. Baltimore Ry. Co., 32 Maryland 411;

Crilly v. Texas & Pacific Ry. Co., decided by Louisiana Supreme Court, January 4, 1892, reported in Vol. LIII, A. & E. R. R. Cases, p. 104;
Kohn v. McNulty, Receiver, 147 U. S. 238.

III.

When the proof establishes a usage or custom, the presumption is that the employe contracted with regard to said usage or custom, and if he seeks to avoid its force and effect, the burden is upon him to show that its existence had been concealed from him by the company, and that he did not know of same, nor could have known of same, by the use of ordinary diligence.

Authorities:

Watson v. Railway Co., 58 Tex. 438.

Since the decision in the case of Improvement Co. v. Munson, 14 Wallace, bottom page 448, it has been well recognized that in the Federal Courts the old doctrine of "scintilla" of evidence is not the rule of law; that the rule is not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. It is further well estalished, as announced in said decisions, that a servant in entering the employment of a master, takes the risk of the master's mode of conducting his business, though a safer one might be followed, if the servant fully knows the risk and continues to work. It is the undisputed evidence in this case that it is absolutely necessary in the operation of railways, and in the operation of defendant's railway, to have scale boxes as much so as it is to have platforms and coal

chutes. It is the undisputed evidence in this case that the company has a standard which it used in the construction of its scale boxes, as much as it has in the construction of its platforms and coal chutes. It is the undisputed evidence in this case that the plaintiff himself had been advised that in the conduct of defendant company's business and affairs, it was necessary to have platforms, coal chutes and scale boxes in close proximity to its tracks, and that they were dangerous, and he must guard against such dangers. It is the undisputed evidence in this case, the plaintiff himself testifying that he knew the location of this particular scale box near tracks No. 2 and 1 in the yard at El Paso. It is the undisputed evidence that this scale box had been there for more that four years prior to the time plaintiff was hurt and that he had been working in the yard in connection with the weighing of cars upon this scale for a week prior to his injury. It is the undisputed evidence that this scale box was a large structure, and was patent and obvious, and could be seen by any one working in connection therewith. In connection with plaintiff's evidence that he knew of the location of this particular scale box, he states that he had no knowledge of the distance between the scale box and track No. 2. He states he was never warned of the danger of getting knocked off of cars by this scale box. We submit that no duty was imposed upon the master to advise Swearingen of the exact distance between the scale box and the side of a car; that no duty was imposed upon the master to furnish him with a measuring stick to measure this distance, but we do respectfully submit that when the master called Swearingen's attention to the fact that it was

necessary in the operation of its business, to have scale boxes, and that they were constructed in dangerous proximity to the tracks, that then Swearingen contracted in regard to the construction of every scale box along the track, and in every yard operated by the defendant company, and when he worked in any yard from El Paso to New Orleans, and saw a scale box, he at once was advised that this was a danger, and an obvious danger, without the necessity of being specifically advised as to the distance between the scale box and a car passing it. Under the facts in this case, and the theory upon which it was presented by the court below, and which was affirmed by the Circuit Court of Appeals, the only way that the defendant company could defend itself against a recovery herein, would be to show that it had advised Swearingen, or he had become advised, of the exact distance between the side of a car and the scale box in the El Paso yard, and make it incumbent upon the master company in this instance to advise every employe working in its yards from El Paso to New Orleans, of the exact distance between the scale boxes and cars operated in the yards. That this would be impracticable, and in many instances absolutely worthless, can be readily seen, because each man would have to guard himself against this danger by first ascertaining the length of his own arm and the distance he could hang out before the scale box became a danger. A fleshy employe would be in greater danger than a thin one, and it would be reducing the rule to an absurdity to say that the master should give the actual measurement between said scale box and the side of a car to an employe, in order to advise him of such danger. In this instance the master did what

any sensible and responsible business man would do. He advised the employe generally that such things were dangers, that they were absolutely necessary in the operation of its railway, and left it to the employe to exercise his own judgment in protecting himself when he worked in connection with such dangers. The plaintiff himself testified that he knew of the location of the scale box before he was hurt (see Record, page 22); that he knew it was between tracks 1 and 2, but did not know anything with reference to its proximity to track 2 (see Record, page 11). He testified that he knew it was necessary to let down a lid upon the south side of the scale box, so as to get at the balances to weigh the cars; that he knew the scale box was there, that he knew the track was there, and that he knew they were not **very far apart**, but **how far apart** he did not know (see Record, page 23). E. B. Smith testified that the scale box on side track No. 2 had been in El Paso for more than four years to his knowledge, at the same point, and that track No. 2 is a switch track, and comes near by and past the depot, and is in use every day for switching; that it is the track most frequently in use at the west end of the yard (see Record, page 24). Said Smith further testified that depot platforms are built as close or closer to the tracks than scale boxes, for convenience in facilitating the work there, and so are the coal chutes; that a man using proper care could safely pass the scale box while riding on the side of a car on track No. 2. W. T. Butts testified that he, in connection with the plaintiff, had worked on the track at the west end several times before on the day plaintiff was hurt; that plaintiff worked on the north side of track or cars,

and on track 2; that he had often seen plaintiff working on that track before the accident; had seen him pass the scale box on the car several times, and seen him lean in and dodge it. These facts are undisputed and without contradiction, and prove the following facts: That plaintiff was an experienced switchman; that he entered the service of the Texas & Pacific Railway Company with full knowledge of the risk incident to working in yards where scale boxes were located; that he was advised of such risk; that in addition to being so advised in this instance of such a risk, he knew of his own personal knowledge the location of the scale box in question, and that it was close to the track; the exact distance he did not know, but he knew that it was dangerous, and that he should exercise proper precaution to protect himself. We submit to the Court, under this state of facts, that the plaintiff unquestionably assumed such risk as incident to his employment, and that no recovery can be had. In connection with the authorities above cited, we call the Court's attention to the case of St. Louis Southwestern Ry. Co. v. Spivey, decided by Civil Court of Appeals of Texas, reported in Texas Court Reporter, pages 434 and 435. We quote the decision in full, as we can find no official publication of same as yet:

"(Civil Appeals, Fifth District. April 4, 1903.)

ST. L. S. W. RY. CO. v. SPIVEY.

Railway Company — Negligence — Obstruction Near Track—Warning—Personal Injuries—Employe.

Appeal from the District Court of Hunt County; H. C. Connor, Judge.

E. B. Perkins and Perkins and Craddock, for appellant.

Looney & Clark, for appellee.

Motion for rehearing overruled April 25, 1903.

Action by Norman Spivey against St. Louis Southwestern Railway Company. From a judgment in favor of plaintiff, the defendant appeals. Affirmed.

TEMPLETON, Associate Justice—Suit by Norman Spivey, a minor, by next friend, against the railway company to recover damages for personal injuries. A jury trial resulted in a judgment for plaintiff for $875.

It was alleged in the petition that the plaintff, who is sixteen years old, was employed as a call boy in and around the company's shops, yards and depots at Commerce; that it was his duty to carry orders to employes of the company working in the said shops, yards and depots; that one night he was sent by his boss to carry certain orders from the freight depot to the passenger depot; that a freight train was passing in that direction and that he swung on to the side of one of the box cars thereof for the purpose of riding to his destination; that while he was so riding in said position his body came in contact with the upright portion of a set of the company's scales for weighing cars, whereby he was injured; that the scales were erected in such close proximity to the track as to endanger the safety of any one riding as he was, and that he did not know the fact; that he had not been warned of the said dander; that it was dark and there was no light at or near the scales; that he was engaged in the performance of the duties of his position when he was injured; that it was customary for call boys and all other employes of the company at Commerce to swing onto passing engines and trains whenever it was convenient for them to do so, in going from point to point in the yards in discharge of their duties; that the custom was known to and acquiesced in by the company, and that it facilitated the dispatch of the company's business for them to so ride on such engines and trains.

> The petition stated a good cause of action. It is true, as contended by appellant, that if it was necessary to erect the scales at the point where the same were placed, a charge of negligence could not be based on the proximity of the scales to the track. But, as we understand the petition, the negligence charged against the company was in employing the boy at a business in which, in the course of the performance of the duties of his position, he would be exposed to danger, without warning him of the danger or taking the proper precautions to make it manifest. The boy was justified, under the custom alleged, in riding on the train as he did; and if he did not know the danger of riding past the scales in the position he was in at the time, and had not been warned of the danger, negligence on the part of the company might be inferred."

We call the Court's attention to the statement in said opinion to the effect "that it is true, as contended by appellant, that if it was necessary to erect the scales at the point where the same were placed, a charge of negligence could not be based upon the proximity of the scales to the track." The scale inspector and constructor of the Texas and Pacific Railway Co., S. M. West, testified that the scale box was constructed in accordance with the standard adopted by the road, and in accordance with the way they are constructed elsewhere, and they were not negligently constructed and that they are standard scales; that he tested a car upon this side of the track when he put in these scales; that he tested one upon the day of the trial; that he stood in the stirrup and held to the ladder, and cleared the scale six or eight inches; that the distance he constructed this scale box from No. 2 track was standard and considered

sufficient in putting in such scales, where the tracks are standard gauge apart (see Record, page 28, 29, 30). This testimony is undisputed, and uncontradicted, and when taken in connection with the testimony of plaintiff himself that he knew the location of the scale box, and that it was "in close proximity to the track, although he could not say in exact inches how close," it certainly was a risk of the business that he assumed, and assumed with full knowledge of such risk. The Court, in the Spivey case above quoted, recognizes the principle that the master owed the duty to the boy to advise him of this risk, as it was such a risk as the boy would not necessarily know in his line of employment. In the case at bar, the master fully advised the employe of the risk, and of a risk that was in the line of his employment, and in addition to so advising him, the employe had actual personal knowledge as to this risk. Surely, if ever there was a case where it was proper for the Court to instruct the jury to find a verdict for the defendant, this is one, for the reason that only one lawful, logical conclusion can be drawn from the facts in this case, that is that the employe had been advised of the risk, that he had full personal knowledge of it, and that with such personal knowledge he carelessly and negligently permitted himself to be injured, his own statement being that he had forgotten the scale box. After the master has notified an employe of a risk, and after the employe has personally advised himself of such risk, he cannot take advantage of his own act or forgetfulness in order to fix and base a liability against the master who has acted in good faith with him. If his own act or forgetfulness in this instance is the cause of his injury, he certainly is estopped from

asserting it, and contending that the master is liable for his injury because, forsooth, he the employe was forgetful.

For the errors assigned we respectfully submit that the cause should be reversed and remanded.

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